

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

WINSTON GREY BRAKEALL, Plaintiff, vs. DERRICK BIEBER, TIM MEIROSE, LANA JACKSON, WILLIAM ALLEN, UNKNOWN DEPARTMENT OF CORRECTIONS EMPLOYEES, Defendants.	4:16-CV-04057-KES ORDER DENYING MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION
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Plaintiff, Winston Grey Brakeall, is an inmate at the South Dakota State Penitentiary (SDSP) in Sioux Falls. He filed a pro se civil rights lawsuit under 42 U.S.C. § 1983. Docket 1. The court screened this complaint and dismissed the majority of the claims. Docket 16. Brakeall moved to amend his complaint, Docket 24, and the court has not yet screened his amended complaint under 28 U.S.C. § 1915A. Brakeall now moves the court to grant him a temporary restraining order and preliminary injunction. Docket 27.

The four factors the court considers in determining whether to grant preliminary injunctive relief are: “ (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.’ ” *Barrett v.*

Claycomb, 705 F.3d 315, 320 (8th Cir. 2013) (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)). Since *Dataphase*, the Eighth Circuit Court of Appeals has “observed that the ‘likelihood of success on the merits is most significant.’” *Id.* (quoting *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 776 (8th Cir. 2012)).

Brakeall cannot show that he is likely to succeed on the merits. Most of the claims in his original complaint were dismissed by this court after screening under § 1915A. Docket 16. His amended complaint has not been screened. Defendants have not been served and will not be served unless Brakeall properly raises claims in his amended complaint.

Brakeall's motion for a temporary restraining order and preliminary injunction concerns his claim that his Fifth Amendment rights were violated when he was incarcerated because of the results of a polygraph exam he was given while on parole. Docket 28. The court dismissed this claim after screening Brakeall's original complaint. Docket 16 at 31-32. Brakeall bases his argument on *United States v. Von Behren*, 822 F.3d 1139 (10th Cir. 2016), a Tenth Circuit case that may be persuasive but is not binding on this court. The issue of whether defendants violated Brakeall's Fifth Amendment rights will be determined during § 1915A screening. At this point, Brakeall cannot show he is likely to succeed on the merits.

Thus, it is

ORDERED that Brakeall's motion for temporary restraining order and preliminary injunction (Docket 27) is denied.

Dated October 17, 2016.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER

UNITED STATES DISTRICT JUDGE